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In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN D. MCKEEL, ET AL., PETITIONERS

v.

ISLAMIC REPUBLIC OF IRAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that Iran is subject to the jurisdiction of United States courts pursuant to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330(a) and 1605(a)(5), for torts it committed at the United States Embassy in Tehran.

1. Petitioners are 13 former hostages who were seized by Iranian militants during the takeover of the United States Embassy in Tehran on November 4, 1979, and two wives of the former hostages. The former hostages filed suit against Iran in the United States District Court for the Central District of California, seeking redress for damages suffered as a result of their captivity. The former hostages also sued the United States, seeking a declaration that the international executive agreement between the United States and Iran barring the hostages from suing Iran was invalid, or, in the alternative, a "taking" of property rights without due process of law. Pet. App. A5-A6, A8 n.3. The two wives sought damages against Iran, alleging that their husbands'

captivity caused them grave emotional distress (Pet. 3). Jurisdiction over Iran was predicated on 28 U.S.C. 1331 and 1332, and the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1330(a), and jurisdiction over the United States was predicated on 28 U.S.C. 1331 and 1361 (Pet. App. A5-A6).

2. The claims of all 13 hostages and one of the wives were consolidated; the claim of the other wife was heard separately (Pet. 4; Pet. App. A6). Both district courts dismissed for lack of subject matter jurisdiction. In holding that Iran was not subject to the jurisdiction of United States courts, both district courts relied on the language and purpose of the FSIA, which they construed to abrogate a foreign state's immunity only for torts occurring in the United States. Both courts concluded that the United States Embassy in Tehran is not part of the "United States" for purposes of the FSIA. *Ibid.* On appeal, the actions were consolidated.

The court of appeals affirmed the district court decisions (Pet. App. A5-A17). The court first held that 28 U.S.C. 1331 and 1332 did not provide a basis for jurisdiction over Iran (Pet. App. A7). Section 1331 was unavailable because the federal question presented by petitioners — whether the FSIA abrogates Iran's immunity from suit — was merely an assertion that federal law deprived Iran of a defense and thus did not satisfy the well-pleaded complaint rule (Pet. App. A8). The court also held that Section 1332 could not be invoked because it extends only to suits between "citizens of a State and citizens or subjects of a foreign state," not to suits against the foreign state itself (Pet. App. A8-A9).

Second, the court of appeals held that it lacked jurisdiction under the FSIA. The court held that 28 U.S.C. 1605(a)(5) permits suits against foreign states only for torts committed within the territorial jurisdiction of the United States. The court concluded that United States embassies, while subject to the jurisdiction of the United States for

several discrete purposes, such as criminal jurisdiction over the conduct of American nationals, are not within the territorial jurisdiction of the United States. Pet. App. A10-A14. The court buttressed its conclusion through reliance on the underlying goal of the FSIA to conform the law of the United States on sovereign immunity to that of international law, which generally holds that "a state loses its sovereign immunity for tortious acts only where they occur in the territory of the forum state" (*id.* at A11). The court also determined that the derivative claims of the wives of the former hostages were precluded by the FSIA (*id.* at A14-A15 n.10). The court reasoned that the FSIA was intended to prescribe the necessary contacts to support an exercise of personal jurisdiction and that the FSIA does not authorize jurisdiction when the only contact with the forum state is an injurious consequence of an out-of-state act or omission (*ibid.*).

Finally, the court of appeals declined to award petitioners declaratory relief against the United States, holding that the United States Claims Court was the proper forum for their underlying "taking" claims (Pet. App. A15-A17).

3. We are filing simultaneously with this memorandum a brief in opposition to the petition in *Persinger* v. *Islamic Republic of Iran*, No. 84-47, which raises the same jurisdictional issue as the instant petition. For the reasons stated in our brief in opposition in *Persinger*, we believe that review by this Court is unwarranted here.[1]

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[1]We are furnishing a copy of our brief in opposition in *Persinger* to counsel in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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